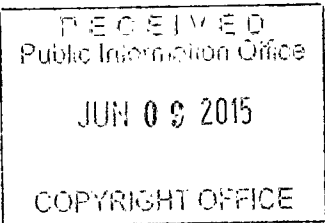


Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.



In the Matter of

**DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)**

**Docket No. 14-CRB-0001-WR
(2016-2020)** Received

JUN 09 2015

Copyright Royalty Board

**iHEARTMEDIA, INC.'S MOTION TO STRIKE SOUNDEXCHANGE, INC.'S
"SUPPLEMENTAL TESTIMONY" OF PROFESSOR DANIEL R. McFADDEN**

With no justification or explanation – much less permission – SoundExchange on June 1, 2015, submitted what it characterized as “Supplemental Testimony” of one of the experts called in its direct case several weeks ago, Professor McFadden. *See* SoundExchange, Inc.’s Supplemental Testimony of Daniel L. McFadden. The testimony contains admittedly new opinions based on an entirely new analysis of data collected by – but not discussed by – Professor Hauser, one of the Services’ rebuttal experts. This eleventh-hour gambit is both prohibited by the controlling rules of this proceeding and patently unfair.

First, the controlling rules required all parties to submit their written direct testimony (“WDT”) by October 7, 2014, and their written rebuttal testimony (“WRT”) by February 23, 2015. The rules make no provision for any late submission of written testimony,¹ much less new

¹ The Panel did allow Professor Rubinfeld to submit “Corrected” WRT, three days after the deadline for submission of WRT. But it did so only after determining that there was no prejudice to any party from this correction, and after ordering supplemental discovery and written submissions to ensure that the services had full opportunity to respond to the late-added material. *See* Order Denying Licensee Services’ Motion To Strike SoundExchange’s “Corrected” Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld and Granting Other Relief, at 12-13 (Apr. 2, 2015). The Panel also required SoundExchange to add this to its direct case, so the Services would have a full opportunity to address it in their rebuttal cases. Only with all of these

WDT submitted just as the six weeks of evidence were coming to a close. Professor McFadden, as a direct witness for SoundExchange, was required to submit all of his opinions in his WDT. While he was permitted to – and did – respond to criticisms of his opinions leveled in the WRT of Professor Hauser, the Panel correctly refused to allow him to offer new opinions and analysis – specifically, his “coding” and analysis of data collected by Professor Hauser but not used or cited by Professor Hauser in his WRT. *See* Apr. 29 Hr’g Tr. at 892:6-895:4.

Second, allowing this eleventh-hour submission by SoundExchange, in contravention of the controlling rules, would be unfair to all of the other parties as well as to the Judges. The Supplemental Testimony concededly comprises new analysis of new data offered in support of new conclusions. By Professor McFadden’s own admission (at 1), his new testimony is a “review of [Professor Hauser’s] survey and response data” that includes a review of “questions asked in Professor Hauser’s qualitative survey *that were not discussed in the Hauser Rebuttal*” (emphasis added). Professor McFadden goes well beyond the evidence already in the case to discuss new survey questions (at 1, 3), new data (at 2-4), new coding of those data (at 4), and even new academic literature (at 3). Professor Hauser was prohibited from offering testimony concerning the exact same issues and data during his rebuttal testimony. *See* May 22 Hr’g Tr. at 5637:3-5638:10.

SoundExchange chose not to recall Professor McFadden to complete his testimony, and the Services agreed to terminate their cross-examinations of him, which had not been completed. *See* May 20 Hr’g Tr. at 4791:7-4792:21; 4893:3-10. SoundExchange now seeks to offer entirely new analysis and opinions when the Services cannot conduct discovery into these new opinions; cannot, through their own experts, respond or offer contrary evidence to this testimony from a

safeguards did the Panel allow the limited addition of new opinions three days after the deadline for written submissions of testimony.

direct case witness; and cannot even test the new opinions and analysis through cross-examination. SoundExchange seeks, in sum, to plant in the record unreliable, untested “evidence” in the form of a surrebuttal that no other party can challenge. The unfairness of this tactic is obvious.

BACKGROUND

In his WDT, Professor McFadden described a survey he conducted that purported to show consumers’ willingness to pay for a limited set of features of interactive streaming services. In rebuttal to Professor McFadden’s WDT, iHeartMedia, Inc. and the National Association of Broadcasters submitted the WRT of Professor John R. Hauser. Professor Hauser criticized Professor McFadden’s survey for being confusing. To show how widespread that confusion was, Professor Hauser conducted a separate qualitative study using Professor McFadden’s exact same survey instrument and questions. Afterward, using a double-blind process, Professor Hauser evaluated whether respondents understood the incentive alignment and product feature descriptions from Professor McFadden’s survey. Professor Hauser found that a significant number of respondents were confused by Professor McFadden’s survey. *See generally* IHM Ex. 3124. Professor Hauser additionally testified that some of this confusion might have been eliminated if Professor McFadden had followed the standard practice of conducting additional pretests following major amendments of the survey language.²

On April 29, Professor McFadden testified during SoundExchange’s direct case. As part of his direct examination, he sought to provide testimony about certain data that Professor Hauser had collected but *did not include* in his WRT.³ Professor McFadden was allowed to

² *See* May 22 Hr’g Tr. at 5567:5-25; *id.* at 5570:2-8.

³ As Professor Hauser explained, he did not have time to analyze the unused data before he submitted his WRT, and, in any event, the analysis of the data could not possibly have changed his

respond to all of Professor Hauser's criticisms of his survey, but he was *not* allowed to present new opinions based on what he described as a new analysis of Professor Hauser's unused data, data which were not in evidence.⁴

On May 22, Professor Hauser testified. The same rule was enforced: Professor Hauser was not permitted to give any new analysis of the unused data, but he was allowed to respond to Professor McFadden's testimony. He indicated that he *had* analyzed those data after his WRT was submitted, in response to criticism of him for not doing so, but upon objection the judges refused to let him go farther. He was not allowed to testify about that analysis, or how it supported his opinions.⁵ Neither expert was allowed, therefore, to analyze the unused data, or to give new opinions as to what the unused data proved, or did not prove.

ARGUMENT

The Judges have made clear that the parties may not flood the record with unauthorized written testimony.⁶ SoundExchange ignored that rule, and its submission should be rejected for that reason alone.

SoundExchange concededly seeks to submit new expert testimony – effectively post-trial – containing an entirely new analysis of new data that are not in evidence and are not the basis

conclusions given the depth and extent of the confusion he had already found in the data that he did analyze. May 22 Hr'g Tr. at 5633:4-5638:4.

⁴ Apr. 29 Hr'g Tr. at 894:15-895:4.

⁵ May 22 Hr'g Tr. at 5637:2-10 (“JUDGE STRICKLER: But whatever support it may or may not be, that conclusion, there's no analysis in the record. THE WITNESS: No. There's no analysis in the record. I memorized the numbers, but I'm not allowed to give them.”); *Id.* at 5609:17-5611:10 (cross-examination by Mr. Blavin in which Professor Hauser was not permitted to answer questions about what Mr. Blavin called “new analysis data”).

⁶ *See, e.g.*, Order Denying Licensee Services' Motion To Strike SoundExchange's “Corrected” Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld and Granting Other Relief, at 13 (Apr. 2, 2015); Summary Order ¶ 9 (Mar. 26, 2015).

for any testimony by any other expert.⁷ Professor McFadden seeks to take data that Professor Hauser did not use or rely upon, analyze the data, and use the data as the basis for providing a new opinion about the reliability of his original survey and the supposed lack of confusion among survey participants. *See* Supplemental Testimony at 2, 4. He also seeks to add new academic literature that he wrongly asserts demonstrates that his incentive alignment language was not confusing. *Id.* at 3.

Professor McFadden was permitted to respond to Professor Hauser's criticism and to explain why he believed the criticism of his survey was unfounded. Apr. 29 Hr'g Tr. at 895:16-906:7. He was not permitted, during his direct examination, to offer the new opinion he seeks to offer now. That is consistent with the rule in this proceeding. Indeed, *no* expert was permitted to offer new opinions; the Judges consistently enforced that sensible rule, to prevent an endless cycle of new opinions, just like the one that SoundExchange now seeks to submit.

Changing the rules now, after the proceeding has ended, would be unfair to the Service participants as well as to the Judges themselves. The Services cannot offer contrary proof or test through cross-examination these belated opinions of Professor McFadden, who was shown to be an unreliable and ill-prepared witness during his appearance in the second week of the hearing.⁸

⁷ As Professor Hauser explained, he obtained more data than he needed for purposes of his opinion, and that he did not "code" or analyze the additional data because nothing in that additional data could have changed his opinion, given the overwhelming evidence of confusion among participants in Professor McFadden's survey. May 22 Hr'g Tr. at 5635:6-5638:4.

⁸ For example, Professor McFadden did not recognize or even *read* materials he had listed as "relied upon." *See, e.g.*, Apr. 29 Hr'g Tr. 922:8-922:17: ("Q. In fact, wasn't this a document that you cited in your testimony as a document you had or an article that you had reviewed or relied upon? A. My list of documents reviewed or relied upon are those from which the conjoint was designed. So to the extent that staff used this to provide me with a list of features, it was relied upon by me. That doesn't mean it was necessarily read by me."); *id.* at 923:5-12: ("Q. So to the best of your recollection, is right now the first time you've seen the article that's here at tab 2? A. . . . I have not read this and I have not read other shots from websites.").

Professor McFadden also repeatedly disclaimed any understanding of the importance of features of webcasting services identified in his own sources – including his own documents that observed that

It is not helpful to the truth-finding process to have such opinions injected into this proceeding, when the parties are unable to provide contrary evidence or test their reliability through cross-examination – and the Judges cannot even question the witnesses about them.

The ostensible basis for SoundExchange’s post-hearing injection of untestable, new opinions is that the Judges supposedly “invited” SoundExchange to submit whatever it wished to submit during colloquy at the time of Professor Fischel’s testimony. That is not the case. Professor Fischel was (properly) permitted to respond to criticism from Mr. Wilcox. Specifically, he was allowed to comment on the financial model (“Warner Financial Model”) that Mr. Wilcox attached to his WRT and claimed as his basis for disputing Professor Fischel’s opinions about Warner’s expectations for its contract with iHeartMedia. Professor Fischel testified that the Warner Financial Model – in evidence as an attachment to Mr. Wilcox’s WRT – confirmed his opinions, *on its face*. Professor Fischel provided no additional data, gave no new opinions, and performed no new analysis (unless multiplying numbers that appear on the face of the Warner Financial Model constitutes “analysis”). Mr. Wilcox testified several weeks after Professor Fischel and was permitted to fully respond to all of Professor Fischel’s testimony,

these features drove consumer “willingness to pay” – but that he did not include in his survey, stating often that he was not an expert in these matters. *See, e.g., id.* at 926:3-22 (asking if counsel would represent one of his sources as reliable: “Q. I’m not representing anything. This is a paper relied upon for your report. A. It was among the materials in my relied upon list, yes. Q. Do you disavow the contents of the paper that you relied upon? A. No. I don’t even know that we used it. I don’t know either way. Q. Do you have any basis to believe that this person is wrong that sound quality is one of the attributes that is perceived to have a positive effect on consumers’ willingness to pay for music streaming services? A. In fact, I have not read this document before, and so without reading it, I’m not ready to make that judgment. Q. Do you know whether your staff read that paper? A. I don’t.”); *id.* at 934:17-22 (regarding social networking features identified in his sources: “Q. I’m asking whether you know whether the ability to share music with other users is a key feature of music streaming services. A. No, I’m not an expert – I’m not an expert in these aspects of the industry.”). Had Professor McFadden returned to finish the cross-examination, it would have been shown that he omitted additional features of webcasting that his own cited sources also said were important to consumers.

including his testimony about the Warner Financial Model sponsored by Mr. Wilcox. *See* June 3 Hr'g Tr. at 7381:25-7426:7.

During Professor Fischel's testimony about the Warner Financial Model – which was fully disclosed before the hearing, tested by cross-examination at the hearing, and contested by contrary evidence from Mr. Wilcox during the rebuttal phase – the Chief Judge stated that *if* the Panel had misapprehended what Professor McFadden had sought to do, if what he sought to do was similar to what Professor Fischel was doing in commenting on the Warner Financial Model for the iHeartMedia deal (which was in evidence as an attachment to Wilcox's WRT), and if the testimony was "critical" to the case, the Panel would consider further testimony from Professor McFadden. *See* May 21 Hr'g Tr. at 5298:5-10.

SoundExchange chose not to bring Professor McFadden back for further testimony (his testimony had ended while he was on cross-examination, and SoundExchange had scheduled his return for re-direct examination). It chose instead to slide written "supplemental" direct testimony under the door at the hearing's end. And its submission is manifestly *not* what Professor Fischel did. Instead, it is the exact same improper new opinion – with *more* new conclusions and supposed data in support – that the Panel properly excluded the first time.

In contrast to Professor Fischel, who simply commented on the *face* of the Warner financial model that Mr. Wilcox attached to his WRT, Professor McFadden claims to have obtained additional data. These data are nowhere in the record, but supposedly are found in the data Professor Hauser collected but decided was unnecessary to analyze. Professor McFadden claims to have conducted an analysis of the new data; and to have come to opinions based on the data, along with additional academic studies. *See* Supplemental Testimony at 3-5.

Professor Fischel disclosed his opinion about the significance of the Warner Financial Model before the hearing (in his Supplemental Written Rebuttal Testimony, and in deposition), was subject to cross-examination and was cross-examined about that opinion, and was followed by a rebuttal case in which Mr. Wilcox had full opportunity to give his explanation of the Warner Financial Model. In contrast, the supplemental testimony of Professor McFadden was never disclosed, cannot be cross-examined,⁹ and will not be followed by any rebuttal evidence from Professor Hauser (or anyone else).

These circumstances thus could not be more different, and the admission of Professor McFadden's new opinions after the close of the evidence would be contrary to the rules, unfair to all of the other parties, and unfair to the Panel, who will not be able to assess the proffered new "evidence" in context; will not be able to see how it stands up to questioning by counsel and the Judges; and will not hear the other side of the story from Professor Hauser.

Indeed, Professor Hauser analyzed the very data that Professor McFadden purports to analyze in his Supplemental Testimony. He referred to that analysis during his oral testimony.¹⁰ If he had been permitted to testify on these issues, he would have explained in detail why the "close out" questions that he did not code or tabulate could not have eliminated or reduced any of the confusion he had already observed in the incentive alignment and product feature descriptions, because individuals often show "false confidence" in their belief that they understood questions in the survey. There were examples even among the videos already submitted in the record (*e.g.*, IHM Ex. 3133) of individuals who very confidently suggested that they understood features but who were in fact wrong. But Professor Hauser was prohibited from

⁹ Apr. 29 Hr'g Tr. at 894:19-25 ("And so we think, we believe, particularly given the character and quality of counsel in this proceeding, that you'll be able to consult with Professor McFadden and construct a very powerful cross-examination for Dr. Hauser on those issues.").

¹⁰ May 22 Hr'g Tr. at 5638:9-10.

giving any analysis or discussion of those calculations, because they amounted to a new analysis. He was thus limited in the exact same way that Professor McFadden had been limited with respect to offering opinions beyond those disclosed in the WDT and WRT.

CONCLUSION

All proceedings must come to an end; records must be closed. SoundExchange is not entitled or even permitted to have the last word on everything. Professor McFadden's admissible opinions were fully developed in his WDT and his oral testimony. He should not be allowed to bolster those opinions with the untimely, post-hearing submission of a concededly new analysis of non-record data that *were not* analyzed and included by Professor Hauser in his WRT – though he was willing and able to provide such analysis when he testified, and was prevented from doing so pursuant to the rules. *See* May 22 Hr'g Tr. at 5637:2-5638:10; 5609:17-5611:11.

Dated: June 9, 2015

Respectfully submitted,

iHEARTMEDIA, INC.

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CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing iHeartMedia, Inc.'s Motion to Strike SoundExchange, Inc.'s "Supplemental Testimony" of Professor Daniel R. McFadden has been served on this 9th day of June 2015 on the following persons:

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